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IN THE
COURT OF APPEALS OF INDIANA

LARRY C. WALDEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0605-CR-420
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne Vorhees, Judge
Cause No. 18C01-0402-FC-8

May 10, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Larry Walden ("Walden") appeals his conviction in the Delaware Circuit Court of Class B felony causing death while operating a motor vehicle under the influence of a schedule I controlled substance with a habitual offender enhancement. On appeal, he raises the following issues:

I. Whether the trial court abused its discretion in allowing expert testimony regarding the movement of Walden and his fiancée during the vehicle accident;

II. Whether the State presented sufficient evidence to prove that Walden had a prior conviction for operating a vehicle while intoxicated;

III. Whether the trial court abused its discretion in rejecting one of Walden's proposed jury instructions; and,

IV. Whether Walden's sentence is appropriate in light of the nature of the offense and character of the offender.

We affirm.

Facts and Procedural History

On December 22, 2001, Walden and his fiancée, Molly Arthur ("Arthur"), were traveling northbound on Highway 35 in Delaware County in Walden's blue pickup truck. Another motorist, Darryl Addison ("Addison"), was driving behind their vehicle when he noticed that their truck began to swerve. Their truck then drove off of the road and landed upside down in a ditch. Neither Walden nor Arthur was wearing a seatbelt at the time of the crash. Arthur was partially ejected from the passenger window, and her head and shoulders were pinned underneath the cab of the truck. Addison observed a male, later identified as Walden, crawl over Arthur's body and out the passenger window of the truck. Arthur later died as a result of head trauma.

On February 23, 2004, the State charged Walden with Class C felony causing death while operating a motor vehicle under the influence of a schedule I controlled substance, Class D felony possession of diazepam, Class D felony possession of dextro propxyphene, and Class A misdemeanor possession of marijuana. On January 27, 2005, the State filed a habitual offender enhancement and a notice of intent to seek an enhanced penalty of operating a motor vehicle while intoxicated based on a prior conviction. The State later dismissed the possession charges.

A trifurcated jury trial commenced on February 27, 2006. In the first phase of the trial, the jury found Walden guilty of Class C felony causing death while operating a motor vehicle under the influence of a schedule I controlled substance. In the second phase, the jury found Walden guilty of committing the offense within five years of a previous conviction for operating a motor vehicle while intoxicated, which elevated the instant offense to a Class B felony. In the third phase, the jury found Walden guilty of being a habitual offender. The trial court held a sentencing hearing on May 10, 2006. It found one mitigating factor, that Walden was remorseful, and numerous aggravating circumstances. Then the trial court sentenced Walden to an aggregate term of fifty years. Walden now appeals. Additional facts will be provided as necessary.

I. Expert Witnesses

Walden first contends that the trial court abused its discretion by allowing expert witnesses to testify as to which person was driving the pickup truck based upon their knowledge of accident reconstruction. Walden contends that the witnesses' testimony amounted to common knowledge and experience of ordinary persons, and therefore

should not have been allowed as expert testimony. The trial court has broad discretion in determining the qualifications of an expert and in admitting opinion evidence. Hill v. State, 470 N.E.2d 1332, 1336 (Ind. 1984). The sufficiency of the foundation for opinion evidence is a matter committed to the sound discretion of the trial court whose decision will be reversed only for an abuse of that discretion. Id. (citation omitted). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the trial court, or the reasonable, probable, and actual deductions to be drawn therefrom. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004).

Indiana Rule of Evidence 702(a) (2007) provides the standard for the admission of expert testimony as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Expert testimony is admissible when the expert has some special knowledge that would assist the trier of fact in understanding the evidence or deciding a factual issue. Osmulski v. Becze, 638 N.E.2d 828, 837 (Ind. Ct. App. 1994). Evidence Rule 704(a) (2007) provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." See also Osmulski, 638 N.E.2d at 837.

At trial, the State presented the expert testimony from two witnesses, Officer Earl McCullough ("Officer McCullough") and Officer Paul Hansard ("Officer Hansard"), both employed with the Indiana State Police. Prior to soliciting Officer McCullough and

Officer Hansard's opinions, the prosecuting attorney established that the officers had training, education and experience to provide the foundation required to offer their expert opinions. Officer McCullough has taken several classes on accident reconstruction at Northwestern University. Tr. pp. 382-383. He has completed one hundred accident reconstructions and has testified both for the State and for defendants. Id. Officer Hansard, who is a detective with the Indiana State Police, has likewise received hundreds of hours of training in accident reconstruction and has participated in several accident reconstructions. Id. at 346. Both officers are certified accident reconstructionists.

Officer McCullough said he based his opinion on Newton's first law of motion, a physics principle. At the hearing on Walden's motion to exclude the testimony, Officer McCullough stated that he had based his opinion on the principle that an object in motion tends to stay in motion until an external force changes the direction of the object. Tr. p. 62. He explained at length that the body of an unrestrained passenger would continue traveling in a forward direction, the direction the vehicle had been traveling, even when the vehicle began to swerve to the left. Id. at 62-63. This would cause the body of an unrestrained passenger sitting in the passenger seat to possibly exit the vehicle through the right passenger window, as Arthur did in this case. Id. Officer Hansard stated that his opinion was likewise based on Newton's law of motion and similarly described how the body of an unrestrained occupant in the vehicle would have moved during the accident. Id. at 361-364.

We cannot agree with Walden that these opinions are merely based on "common sense." The officers had extensive training, which included education in the laws of

physics and accident reconstruction. This specialized knowledge certainly qualified them to give testimony on their opinion as to who was driving and who was riding as a passenger.

II. Evidence of Prior Conviction

Walden next contends that the State presented insufficient evidence of his prior conviction of operating a vehicle while intoxicated. Specifically, Walden contends that there can never be sufficient evidence of a prior conviction unless the State presents a certified copy of the judgment of conviction. Because this case presents a sufficiency question, we do not reweigh the evidence but instead look at the evidence in the light most favorable to the verdict. See Toney v. State, 715 N.E.2d 367, 369 (Ind. 1999).

In regard to the use of documents to establish the existence of prior convictions our supreme court has stated:

> Certified copies of judgments or commitments containing a defendant's name or a similar name may be introduced to prove the commission of prior felonies. Schlomer v. State, 580 N.E.2d 950, 958 (Ind. 1991) (citing Andrews v. State, 536 N.E.2d 507 (Ind. 1989)). While there must be supporting evidence to identify the defendant as the person named in the documents, the evidence may be circumstantial. Id.; see also Coker v. State, 455 N.E.2d 319, 322 (Ind. 1983). If the evidence yields logical and reasonable inferences from which the finder of fact may determine beyond a reasonable doubt that it was a defendant who was convicted of the prior felony, then a sufficient connection has been shown. Pointer v. State, 499 N.E.2d 1087, 1089 (Ind. 1986).

Hernandez v. State, 716 N.E.2d 948, 953 (Ind. 1999).

To prove that Walden had a prior conviction for operating a vehicle while intoxicated, the State presented Joann King ("King"), an adult probation officer in Henry County. King identified Walden and testified that Walden had been placed under her

supervision for probation after he was convicted of operating a vehicle while intoxicated. The State also presented the information for this charge and a plea agreement, which was signed by Walden, filed with the trial court on May 30, 2001, and later certified by the Henry County clerk as the original instrument. The State also presented the chronological case summary of this previous cause number, showing that Walden was convicted of operating a vehicle while intoxicated on May 30, 2001. All three of the documents carry a consistent cause number for this offense and the name of Walden.

While we acknowledge that it would be the best practice for the State to submit into evidence a certified copy of the judgment of conviction, we do not deem failure to do so reversible error when, as in this case, the State has submitted other documents that constitute overwhelming evidence of the defendant's prior conviction. Here, there was overwhelming evidence from which a fact-finder could find beyond a reasonable doubt that Walden had been convicted of operating a vehicle while intoxicated in the last five years. See Tyson v. State, 766 N.E.2d 715, 718 (Ind. 2002) (holding that there was sufficient evidence of defendant's prior conviction where State presented the information, plea agreement, and the minutes of the court for the guilty plea).

III. Jury Instruction

Walden next contends that the trial court abused its discretion in the habitual offender enhancement phase of the trial in refusing his proffered jury instruction. Specifically, Walden requested the jury be instructed as follows: "Even where the jury finds the facts of the prerequisite prior felony convictions to be uncontroverted, the jury

still has the unquestioned right to refuse to find the Defendant to be a habitual offender at law." Appellant's App. p. 253.

> The manner of instructing a jury is left to the sound discretion of the trial court, and we review its decision thereon only for an abuse of that discretion. When the trial court refuses a tendered instruction, we must consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. Jury instructions are to be considered as a whole and in reference to each other. Error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights.

Stringer v. State**,** 853 N.E.2d 543, 548 (Ind. Ct. App. 2006) (citations omitted).

Walden contends that his proffered jury instruction was necessary to explain to the jury the meaning of its ability to determine the law. However, the trial court gave the following jury instruction: "Under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's instructions are your best source in determining the Law." Appellant's App. p. 261. Walden does not contend that this instruction was erroneous or contrary to law. Rather, he merely challenges whether this instruction was sufficient to instruct the jury on its ability to determine Walden's prior conviction as a matter of law.

Both the trial court's instruction and Walden's proffered instruction inform the jury that it may determine both the law and the facts of the case. While it is true that Walden's proffered jury instruction has been approved by Seay v. State, 698 N.E.2d 732, 734 (Ind. 1998), there is not so substantial a distinction between the two instructions for us to conclude that the trial court's instruction misled the jury as to its duty to determine

the law or that the instruction prejudiced Walden's substantive rights. Therefore, we conclude the trial court did not abuse its discretion.

IV. Appropriate Sentence

Walden lastly contends that his aggregate sentence of fifty years is inappropriate in light of the nature of the offense and character of the offender. Indiana's appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2006); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

Walden proposes a long list of mitigating circumstances that he believes we should consider in determining that his sentence is inappropriate. The majority of these proffered mitigating factors were not argued before the trial court at sentencing. In fact, the trial court noted in its sentencing order, which only found Walden's remorse as a mitigating factor, that "[t]he Court finds the Probation Officer did not identify any other circumstances justifying an advisory or reduced sentence, nor did the Defendant offer any circumstances." Br. of Appellant at 22. We therefore deem the additional proffered mitigating circumstances waived and decline to address them for the first time upon appeal. See Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (defendant's failure to raise proposed mitigators at sentencing precludes his raising them for the first time upon appeal). Furthermore, Walden does not contend that the trial court overlooked any mitigating factors. In his Appellate Rule 7 argument, he impliedly contends that the trial court should have afforded more mitigating weight to his list of proffered mitigating

factors. However, we note that a trial court is not obligated to weigh or credit mitigating factors as a defendant requests. Highbaugh v. State, 773 N.E.2d 247, 252 (Ind. 2002).

In the case at hand, Walden received the maximum sentence. He was sentenced to twenty years on the Class B felony and an additional thirty years for the habitual offender enhancement for an aggregate sentence of fifty years.[1] The trial court specifically noted, "In balancing the circumstances, the Court is fully aware that trial courts in Indiana should reserve the maximum sentence for the worst offenders. The Court finds this is such a case." Br. of Appellant at 23.

Regarding the character of the offender, we find it significant that Walden has quite an extensive criminal history, as the trial court's sentencing statement elaborately describes. Walden started committing juvenile offenses when he was fifteen years old. Walden was adjudicated a delinquent in Kentucky for second-degree burglary and theft by unlawful taking. He was referred to probation multiple times, once for Class B felony burglary. In 1989, right before Walden's eighteenth birthday, he was adjudicated in violation of his probation and ordered to spend fifteen weekends in the Henry County jail. This probation revocation was based upon three arrests for illegal consumption, two arrests for curfew violation, a positive drug screen, and association with criminal offenders.

Walden's adult criminal history began in the same month that he turned eighteen years old and consists of convictions for Class A misdemeanor resisting law enforcement, Class A misdemeanor operating a vehicle while intoxicated, Class A misdemeanor

[1] In its brief, the State provides that Walden "was sentenced to fifteen years with thirteen executed and two suspended." Br. of Appellee at 7. Supporting this assertion, the State cites to page 43 in volume III. No such cite exists, and the State's assertion is clearly untrue.

criminal trespass, Class B misdemeanor public intoxication, Class C misdemeanor illegal consumption, Class C felony burglary, and Class C felony reckless homicide. Walden has several probation violations as well. In September 2001, Walden was charged with Class D felony operating a vehicle while intoxicated, a cause that was still pending at the time of the instant offense. The instant offense occurred in December of 2001, while Walden was still on parole for his reckless homicide conviction.

The trial court noted that despite Walden's lengthy history of crimes involving substance abuse, Walden has never voluntarily attempted to address his drug and alcohol abuse. Tr. p. 681. In fact, Walden admitted that after he was released on parole in December of 1999, he continued to use drugs and alcohol on a daily basis. Id. This led the trial court to conclude that Walden would not take advantage of further opportunities to rehabilitate himself and that he had no intention of discontinuing his illegal use of drugs, which endangers other people. Id. at 683. The trial court further noted that given Walden's lengthy record, "the question is not if [Walden] will commit another crime, but when [Walden] will commit another crime once he is released from custody." Br. of Appellant at 24.

Regarding the nature of the offense, we find it significant that Walden committed this offense while he was on parole from his reckless homicide conviction. Given all of these facts, we agree with the trial court that Walden's past behavior demonstrates a pattern of disrespect for authority, including crimes against people and crimes that endanger society as a whole. Given the nature of the offense and character of the

offender, we cannot conclude that the trial court abused its discretion in sentencing Walden to the maximum aggregate sentence of fifty years.

Conclusion

We conclude that the trial court did not abuse its discretion in admitting expert testimony about who was driving the vehicle, or in rejecting Walden's proposed jury instruction. There was sufficient evidence to support the jury's conclusion that Walden had a prior conviction for operating a vehicle while intoxicated, and Walden's aggregate sentence of fifty years is not inappropriate in light of the nature of the offense and character of the offender.

Affirmed.

NAJAM, J., and MAY, J., concur.